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No. 97-372

In The

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Petitioner,

v.

UNITED STATES SHOE CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts correctly ruled that the Export Clause of the United States Constitution precludes the application of a federal *ad valorem* tax on articles to be exported from the United States, particularly where the tax in question — the Harbor Maintenance Tax, 26 U.S.C. § 4461 — imposes a tax burden that exceeds by hundreds of millions of dollars the harbor maintenance services supposedly funded by the tax.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 LISTING

On May 23, 1995, the assets of the Footwear Division of Respondent United States Shoe Corporation were acquired by Nine West Group Inc. Nine West Group Inc. is a publicly traded company. There are no parent companies and no nonwholly owned subsidiaries other than as set forth herein.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions set forth in the Government's petition, the following statutory provisions are also relevant:

26 U.S.C. § 9505 provides:

Harbor Maintenance Trust Fund

(a) Creation of trust fund.— There is hereby established in the Treasury of the United States a trust fund to be known as the "Harbor Maintenance Trust Fund", consisting of such amounts as may be—

(1) appropriated to the Harbor Maintenance Trust Fund as provided in this section,

(2) transferred to the Harbor Maintenance Trust Fund by the Saint Lawrence Seaway Development Corporation pursuant to section 13(a) of the Act of May 13, 1954, or

(3) credited to the Harbor Maintenance Trust Fund as provided in section 9602(b).

(b) Transfer to Harbor Maintenance Trust Fund of amounts equivalent to certain taxes.— There are hereby appropriated to the Harbor Maintenance Trust Fund amounts equivalent to the taxes received in the Treasury under section 4461 (relating to harbor maintenance tax).

(c) Expenditures from Harbor Maintenance Trust Fund.— Amounts in the Harbor Maintenance Trust Fund shall be available, as provided by appropriation Acts, for making expenditures —

(1) to carry out section 210 of the Water Resources Development Act of 1986 (as in effect on the date of the enactment of the Water Resources Development Act of 1996),

(2) for payments of rebates of tolls or charges pursuant to section 13(b) of the Act of May 13, 1954 (as in effect on April 1, 1987), and

(3) for the payment of all expenses of administration incurred by the Department of the Treasury, the Army Corps of Engineers, and the Department of Commerce related to the administration of subchapter A of chapter 36 (relating to harbor maintenance tax), but not in excess of $5,000,000 for any fiscal year.

26 U.S.C. § 9602 provides:

Management of Trust Funds

* * *

(b) Investment.—

(1) In general.—It shall be the duty of the Secretary of the Treasury to invest such portion of any Trust Fund established by subchapter A as is not, in his judgment, required to meet current withdrawals. Such investments may be made only in interest-bearing obligations of the United States...

STATEMENT

This suit challenges the Harbor Maintenance Tax ("HMT"), as applied under § 4461 of the Internal Revenue Code (26 U.S.C. § 4461) to merchandise exported from the United States, as violative of the Export Clause of the United States Constitution. The Export Clause provides that "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. The United States Court of International Trade ("CIT") held the HMT unconstitutional as applied to exports, and the Court of Appeals for the Federal Circuit affirmed, relying in substantial part on this Court's

recent decision in *United States v. International Business Machines Corp.*, 116 S. Ct. 1793 (1996) (hereinafter "*IBM*").

The HMT is described in the statute as a "tax on any port use." 26 U.S.C. § 4461(a). The term "port use" is defined as the loading or unloading of commercial cargo on or from a commercial vessel at a port. 26 U.S.C. § 4462(a)(1). As applied to exports, the HMT is (1) paid by the exporter (26 U.S.C. § 4461(c)(1)(B)); (2) assessed as a percentage (currently 0.125%) of the value of the exported merchandise (26 U.S.C. § 4461(b)); and (3) imposed at the time the goods are loaded on the vessel for export (26 U.S.C. § 4461(c)(2)).

HMT payments are received by the United States Customs Service and deposited into the United States Treasury (App. 70a, *citing* U.S. General Accounting Office, *U.S. Customs Service: Limitations in Collecting Harbor Maintenance Fees*, GAO/GGD-92-25, at 5 (Dec. 1991)). An equivalent amount of monies received is then appropriated from the Treasury to the Harbor Maintenance Trust Fund ("Trust Fund"), from which expenditures may be made if further authorized by Congress. 26 U.S.C. § 9505.

The Trust Fund has run a yearly surplus since its inception. (App. 51a, *citing Second Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1993* at 5 (1994)).[1] The cumulative surplus was $865 million as of fiscal year 1996 and is projected to reach nearly $3 billion as of fiscal year 2001. *Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Years 1995 and 1996* at 7 (1997) ("*1995-96 Annual Report*"). *See also* App. 88a-89a (referring to surplus as of 1994).

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[1] The President is required to transmit annually to Congress a report on the status of the Trust Fund. Pub. L. 102-580, § 330, 106 Stat. 4797, 4851 (1992).

HMT revenues are included in federal budget calculations. As the CIT observed:

> The practice of listing trust fund revenues on budget permits them to be included in calculations of the federal budget deficit. Thus, any monies contributed by such funds to the budget decreases the Treasury's need to borrow in order to finance the federal deficit.

(App. 51a, *citing* H.R. Rep. No. 251 pt. III, 99th Cong., 1st Sess. 19 (1985)).

Respondent United States Shoe Corporation filed suit in the CIT for a refund of HMT paid in connection with its exports for the quarter ending June 30, 1994. A three-judge panel unanimously held that the HMT, as applied to exports, is unconstitutional under the Export Clause. A five-judge panel of the Court of Appeals for the Federal Circuit affirmed the CIT's judgment, with one judge dissenting.[2]

In holding that the HMT is an unconstitutional tax on exported articles, the CIT stated (App. 66a-67a):

> Here, Congress imposed the Tax directly upon exports well along the stream of exportation. The Tax is assessed at the time of loading the cargo. 26 U.S.C. § 4461(c)(2). As a tax imposed upon delivery of cargo to a carrier violates the Export Clause, *see A.G. Spalding*, 262 U.S. at 68-70, 43 S. Ct. at 485-86, a tax imposed on

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[2] Both courts below unanimously held that the CIT had jurisdiction under 28 U.S.C. § 1581(i). The Government acknowledges that the CIT properly exercised jurisdiction (Pet. 7 n.2), but its explanation of the CIT's jurisdiction is inaccurate. The Court of Appeals confirmed that the CIT had subject matter jurisdiction under 28 U.S.C. § 1581(i), as there is no basis upon which to file a valid protest challenging the HMT because the prerequisite to such a filing — a "decision" of the Customs Service — is nonexistent in the HMT context, and therefore jurisdiction under 28 U.S.C. § 1581(a) cannot lie. (App. 8a-13a).

the further step of loading such cargo onto the vessel also falls within the prohibition of the Clause.

The Tax is assessed *ad valorem* directly upon the value of the cargo itself, not upon any services rendered for the cargo, or upon any instruments of commerce that accompany the goods. Further, an *ad valorem* tax is levied in direct proportion to an article's value. Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exported.

The CIT found that the HMT is not a user fee under the three-prong test set forth by the Court in *Massachusetts v. United States*, 435 U.S. 444 (1978), as derived from *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). Under *Massachusetts*, in order to constitute a user fee rather than a tax, (1) the charge must not discriminate against the constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of the system at issue; and (3) the charge must be structured to produce revenue fairly apportioned to the total cost to the Government of the benefits conferred. *Massachusetts*, 435 U.S. at 464-70. While failure to meet just one prong would have disqualified the HMT from being considered a user fee, the CIT found that the HMT fails both the second and third prongs. (App. 60a).

The CIT concluded that the HMT is not based upon a fair approximation of use for the following reasons: (1) exporters and importers of low-value bulk cargo use port facilities to a much greater extent than exporters and importers of high-value non-bulk cargo, yet the former bear lower HMT costs than the latter; (2) most large ports paying the majority of HMT costs receive no more than 30% back in maintenance expenditures; and (3) although only certain commercial users must pay the tax, they are not the sole users of the ports nor

the only beneficiaries of maintenance and development projects.[3] (App. 60a).

With respect to the third prong under *Massachusetts*, the CIT recognized not only that the HMT is "on budget," thereby permitting HMT revenues to be included in calculations of the federal deficit (App. 51a), but also found that the HMT is excessive in relation to the cost to the Government, as it is used to fund projects yet to be commenced or even envisioned (rather than to repay the Government for services rendered), and has produced a continually expanding surplus that is used to offset general federal deficits. (App. 60a).

Relying in substantial part on this Court's recent decision in *IBM*, the Court of Appeals affirmed the CIT's holding that the HMT is unconstitutional as a tax or duty on exported articles. The court noted (App. 24a):

> Here, the HMT is imposed on an *ad valorem* basis at the time the exported goods are loaded on the vessel, rather than at some prior point in time when the goods are not yet bound for export. The exporter, rather than the manufacturer, pays the tax. In the absence of the export act of loading the goods, and in the absence of the exporter's documents required for that act, the HMT would not be owed and no amount could be determined because the HMT is incurred at the time of loading, 26 U.S.C. § 4461(c)(2)(A), and is based on the value of the

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[3] Many "port users" are not subject to the HMT, as numerous exemptions exist in the statute. These include intraport movements of cargo, port use by the U.S. Government, humanitarian and development assistance cargo, fish or other aquatic animals not previously landed on shore, bunker fuel, ship's stores, and any cargo shipped between the continental United States and Alaska, Hawaii or any U.S. possession for ultimate consumption at its destination (with the exception of crude oil transported from Alaska). 26 U.S.C. § 4462.

goods as determined by the standard commercial export documentation, 26 U.S.C. § 4462(a)(5)(A). *See also* 19 C.F.R. § 24.24(e)(2)(i).

The Court of Appeals also upheld the CIT's determination that the HMT is not a user fee under *Massachusetts* because it is not based on a fair approximation of use. (App. 23a). The Court of Appeals distinguished cases relied on by the Government in which *ad valorem* fees were upheld, *United States v. Sperry Corp.*, 493 U.S. 52 (1989), and *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). The court noted that exporters are not assured harbor maintenance at the harbor where their goods are loaded, and the HMT, as imposed on exports, is paid by indirect users of the harbors — exporters, rather than the direct users — the ship owners. (App. 19a-21a). The court further observed that because *Sperry* involved a suit under the Just Compensation Clause, the standard for upholding the assessment in that case was less strict than the standard that applies under the Commerce Clause. The Court of Appeals noted that "per *IBM*, the Export Clause is still more restrictive." (App. 19a-20a).

Finally, the Court of Appeals rejected the Government's contention that "fair approximation of use" refers to "the value of the benefits received" as opposed to "the costs of the benefits received." The court noted: (1) the *Massachusetts* case itself suggests that the value of the benefits is not the appropriate measure; (2) higher value merchandise does not always correlate to a higher profit margin; (3) exporters are forced to pay for harbor maintenance nationwide even though they receive no benefits from harbors other than the one they use; and (4) the HMT does not pay for services such as police, fire or rescue units, which provide benefits to exporters by keeping harbors safe whether the exporters use those services or not. (App. 21a-22a).

REASONS FOR DENYING THE WRIT

1. The Lower Courts Correctly Ruled That This Case Is Governed By Last Year's Decision In *United States v. IBM*. The Government Has Shown No Basis For Yet Another Review Of The Export Clause At This Time.

Just one year ago, this Court engaged in an exhaustive analysis of the rarely litigated Export Clause. In *IBM*, the Court reaffirmed almost a century of Export Clause jurisprudence[4] and ruled that the Export Clause prohibits the application of even generally applicable federal taxes on export shipments, stating that "the Export Clause strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation." 116 S. Ct. at 1797. The Court also emphasized that the term "tax," as used in the Export Clause context, should be given its "common, and usually expansive" meaning. *Id.* at 1802.

All parties to the instant case, as well as the Court of Appeals, recognized from the outset the significance of the Court's decision in *IBM* for this litigation. Notably, the Government moved for, and was granted, a stay of this case at the Court of Appeals pending this Court's decision in *IBM*. At the outset of its discussion on the merits, the Court of Appeals recognized that this Court "recently analyzed the Export Clause" in *IBM*, holding "that the Export Clause does not permit 'the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit.'" (App. 15a, *quoting IBM*, 116 S. Ct. at 1795).

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[4] Including *Fairbank v. United States*, 181 U.S. 283 (1901); *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915); *United States v. Hvoslef*, 237 U.S. 1 (1915); and *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923).

In its petition for a writ of certiorari in *IBM*, the Government had specifically argued as a reason for granting the writ in that case that the Court's decision there would have significance for the case at bar. Referring to the HMT as a tax subject to the Export Clause, the Government stated:

> The question presented in this case is of substantial recurring importance. The proper scope of the Export Clause has significance not only for the tax imposed under Section 4371 *but also for other nondiscriminatory federal taxes of general application. For example, Section 4461 imposes on all shippers a "tax on any port use" of 0.125 percent of the value of all commercial cargo loaded or unloaded in United States ports*. See 26 U.S.C. 4461(a), (b) (Supp. V 1993), 4462(a)(1). Approximately 700 cases are currently pending in the United States Court of International Trade challenging the constitutionality of that statute under the Export Clause. See *United States Shoe Corp. v. United States*, No. 94-11-00668 (Ct. Int. Trade).

Petition for Writ of Certiorari at 13-14, *United States v. International Business Machines Corp.*, Docket No. 95-591 (emphasis added). In this light, it is telling that the Government's petition in this case is devoid of even a mention of *IBM*.

The Court of Appeals applied *IBM* (App. 15a-16a) and correctly determined that the HMT is a prohibited tax on exports, recognizing that the HMT statute itself, 26 U.S.C. § 4461, repeatedly refers to the HMT as a tax, and is codified in the Internal Revenue Code. (App. 17a). The HMT also operates as a tax. While facially the HMT is imposed on any "port use," the statute defines "port use" as the loading or unloading of commercial cargo on or from a commercial vessel at a port. Thus, the tax is applied without regard to size of the vessel, manner or extent of use of port facilities, or the condition of the particular port. (App. 49a). It is not

the vessel operator or carrier who is liable for the tax, but rather the exporter. 26 U.S.C. § 4461(c)(1)(B). *See also*, S. Rep. No. 126, 99th Cong., 1st Sess. 9 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647 (the HMT "is not on the harbor, nor is it on the vessel's operator or owner. The tax is set on the value of the cargo, and is to be paid by the owner of the cargo, or his agent."). As the assessment of the HMT is at an *ad valorem* rate against the value of cargo loaded on board vessel for export (26 U.S.C. § 4461(b)), the HMT is a direct tax on the exported article.[5]

This case thus does *not* present the issue reserved for "another day" in *IBM*, *i.e.*, whether a particular assessment on an activity or service is so closely connected to the goods as to amount to a tax on the goods themselves. 116 S. Ct. at 1804. The HMT is not merely "essentially" a tax on the goods themselves (the situation presented by the insurance policy tax in *IBM*, 116 S. Ct. at 1803); as the Court of Appeals determined, it *is* a direct tax on the export goods themselves. (App. 24a).[6] Thus, the case for the

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[5] Although the Government seeks to convey the impression that the legislative history of the HMT statute was clear, demonstrating that Congress understood the HMT to be a user fee rather than a tax (Pet. 14 and 23), this is belied by the terms of the statute itself and by legislative history which reveals doubts about the HMT's constitutionality. The "legislative history reflects that the drafters of the Act were abundantly aware of the constitutional infirmity of the Act." (App. 84a) (Musgrave, J., concurring). *See, e.g.*, H.R. Rep. No. 251(IV), 99th Cong., 1st Sess. 23, 41-42 (1985).

[6] Accordingly, this case does not raise the concerns addressed in Justice Kennedy's dissenting opinion in *IBM*, which concludes that the Framers did not understand the Export Clause to prohibit taxes on services such as insurance that may have an *indirect* effect on the export process. *IBM*, 116 S. Ct. at 1809. The applicability of the Export Clause's strict prohibition to the HMT is clear and is much stronger than in the case of the insurance at issue in *IBM*. The HMT is an *ad valorem* tax imposed

unconstitutionality of the HMT is even more compelling than that for the tax found objectionable in *IBM*.

Because the Court has recently considered and ruled on the scope of the Export Clause, and because the decisions below present nothing new and are wholly consistent with relevant precedent of this Court, the petition should be denied.

2. The Lower Courts Correctly Analyzed The Factual Record To Conclude That The Harbor Maintenance Tax Is Not A "User Fee" Outside The Scope Of The Export Clause. The Government's Counter-Arguments, All Considered And Rejected By The Courts Below, Are Not Supported By The Record.

Having lost the key battle of *IBM*, the Government is relegated to arguing that the Harbor Maintenance Tax is a "user fee" and not a "tax or duty," and hence outside the scope of Export Clause protection. Two expert and specialized lower courts — the Court of International Trade and the Court of Appeals for the Federal Circuit — both rejected this argument. Indeed, the Government lost by a lopsided majority of seven judges to one. Only a single dissenter on the Court of Appeals' five-judge panel, and no judges on the CIT's three-judge panel, accepted the Government's claim that the record allowed the Harbor Maintenance Tax to be characterized as a "user fee."[7]

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directly on export cargo, as opposed to on a service or instrument associated with export.

[7] To the extent that the Government is arguing that legislation enacted pursuant to Commerce Clause authority can impinge on the explicit prohibition in the Export Clause against federal taxation (*see* Pet. 13-14 n.3), that argument was correctly rejected by the Court of Appeals. (App. 25a-29a). "The text of the Export Clause... expressly prohibits Congress from laying any tax or duty on exports," and general Commerce Clause

While recognizing that the Export Clause might well require a standard even less favorable to the Government (*see, e.g.*, App. 19a-20a discussing *IBM)*, the two lower courts applied the three-part test of *Massachusetts v. United States*, 435 U.S. 444 (1978).[8] The Government does not claim that the lower courts applied the wrong standard, but argues only that they erred in its application. This is in substantial part a fact-specific inquiry, and there is no reason for this Court to engage in the same application-of-law analysis for yet a third time.

Furthermore, the record here does not support the legal arguments that the Government advances. For example, with respect to the requirement of *Massachusetts* that revenues not be excessive in relation to the cost of governmental benefits conferred (435 U.S. at 464), the Government states that the Harbor Maintenance Trust Fund "has provided *approximately*

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jurisprudence cannot override that express prohibition. *IBM*, 116 S. Ct. at 1799. *See also North American Co. v. SEC*, 327 U.S. 686, 704-05 (1946) (congressional power under the Commerce Clause "is limited by express provisions in other parts of the Constitution"). Even assuming, *arguendo*, that the HMT is appended to an otherwise valid regulatory program, that fact is irrelevant:

> [T]he freedom of exportation being guaranteed by the Constitution it cannot be disturbed by *any form* of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance.

Fairbank v. United States, 181 U.S. at 295 (emphasis added).

[8] *Massachusetts* involved the question whether a federal aircraft registration fee violated the intergovernmental tax immunity doctrine. As the Court of Appeals recognized, the Export Clause is particularly restrictive. *See* App. 19a-20a, noting that in *United States v. Sperry Corp.*, 493 U.S. 52, 61 n.7 (1989), the Court recognized that the standard under the Just Compensation Clause is less strict than that under the Commerce Clause, and, that "per *IBM*, the Export Clause is still more restrictive." (App. 19a-20a, *citing* 116 S. Ct. at 1799).

100 percent" of the funds currently used for harbor maintenance (Pet. 6 n.1; emphasis added) and that the fund's "current[]... positive balance" can be explained by year-to-year fluctuations in needs (*id.* 15-16 and 17 n.4). But the record contains no evidence remotely suggesting that the current (and growing) fund surplus is temporary or related in any way to projected maintenance needs.

To the contrary, as the CIT found, since its inception the HMT has generated revenues far in excess of total costs, as demonstrated by the ever-growing surplus accumulated in the Trust Fund. (App. 51a). *See supra* p. 4. As the CIT further noted, even as to possible future application of the Fund, the HMT "is used to fund projects yet to be commenced, *or even envisioned*, rather than to repay the government for services rendered." (App. 60a) (emphasis added). As the Executive Branch has itself recognized, the surplus is of "continu[ing]" and "growing" concern. *1995-96 Annual Report* at 7-8.[9]

The Government also states that revenues collected under the HMT are "deposited in the Harbor Maintenance Trust Fund" (Pet. 5; *see also id.* 15) and "may not be used to support the general welfare" (Pet. 15). This is not accurate, and in any event tells only half the story. Funds received by the Customs Service are in fact deposited into the general United States Treasury (App. 70a), and then an "equivalent amount" is appropriated into the Trust Fund. 26 U.S.C. § 9505. Some of the Trust Fund is then expended for maintenance, but an increasing amount remains unexpended. This surplus is then invested in Government obligations (26 U.S.C. § 9602(b)(1)) and thereby returned to the Treasury for general public use. The Trust Fund, accordingly, serves only as a conduit from and to the general Treasury.

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[9] Even Judge Mayer, the sole dissenting judge below, found that the Trust Fund's large and ever-growing surplus was "troubling." (App. 43a).

Additionally, as the CIT noted, HMT proceeds are included "on budget" in calculating Government tax receipts and thus used to offset Government deficit calculations. This, in turn, decreases the need for Treasury borrowings to finance the deficit. (App. 51a). For all practical purposes, therefore, revenues from the Harbor Maintenance Tax are used for general public purposes in the same manner as they would if no Trust Fund existed at all.

Even with respect to those portions of the Trust Fund that are used for harbor maintenance, these provide a broad public service that historically was funded from general tax revenues. *See* S. Rep. No. 228, 99th Cong., 1st Sess. 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6709 ("Historically, Federal expenditures for development and operations and maintenance of harbors and ports have been financed from general revenues."). The HMT simply substituted one "tax" for another. *See* S. Rep. No. 126 at 2, *reprinted in* 1986 U.S.C.C.A.N. at 6640 (describing the HMT as "a new *tax* to cover a portion of Federal spending on harbor maintenance") (emphasis added).[10]

The very nature of the HMT — an *ad valorem* tax assessed upon the loading of exports for shipment abroad — is compelling evidence against the Government's user fee argument. With regard to the requirement of *Massachusetts*

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[10] Moreover, even payments made from the Trust Fund are for uses well beyond mere harbor maintenance. For example, Trust Fund revenues are used for St. Lawrence Seaway Development Corporation rent payments which are transferred to the Department of Transportation. *See Third Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1994* at 2 (1995). Additionally, the National Oceanic and Atmospheric Administration is a potential recipient of funds from the Trust Fund, for activities such as the creation of navigation charts and marine weather forecasting. *See 1995-96 Annual Report* at 3; *see also* App. 51a, *citing* Office of Management and Budget, Executive Office of the President, *FY 1996: Budget of the U.S. Government, Appendix*, 376, 802 (1995).

that the charge must be based upon a fair approximation of use, the Court of Appeals correctly found that there is no correlation between the amount of HMT an exporter pays and amount of port usage. The HMT is computed *ad valorem* against the value of the cargo, irrespective of its weight, size and use of the port. Exporters and importers of low-value, high-bulk cargo, who necessarily require deep draft vessels and a correspondingly greater degree of dredging, use port facilities to a much greater extent than exporters and importers of high-value, low-bulk cargo, who need only a shallow draft harbor, yet the former pay less HMT than the latter. Moreover, many parties who use the harbor pay no HMT (*see, e.g., supra* note 3, listing HMT exemptions).

The Army Corps of Engineers has acknowledged that there is "*no relationship* between the amount of money spent on a port's maintenance, and the amount of revenue collected from cargo moving in or out of that particular port." Army Corps of Engineers, *Briefing Book and Fact Sheets on the Harbor Maintenance Fee and Trust Fund* at 1 (Feb. 14, 1990) (emphasis added). Moreover, most large ports paying the majority of the costs receive no more than 30% back in maintenance expenditures. (App. 60a, *citing* Army Corps of Engineers, *Estimated Receipts of Harbor Maintenance Fee from Cargo Transiting Major Ports* (1992) (draft document)). In one notable example, of an estimated $78,711,000 in 1992 taxes on exports and imports collected from the Port of Los Angeles, only $162,000 was returned in port operation expenditures. *Id.*

The Government contends that by imposing the HMT "on an *ad valorem* basis, Congress rationally concluded that shippers of higher value cargo would receive greater benefits (*e.g.*, greater profits)" from port maintenance. (Pet. 23). This demonstrates that the HMT is not tied in any way to specific use or benefit, but rather, like a tax, is imposed on a taxpayer based on a presumed profit margin and a presumed corresponding ability to pay. In any event, the Court of

Appeals properly observed that "the government has failed to present any facts that would suggest that, even on average," higher value merchandise correlates with a higher profit margin. (App. 22a). Profit on goods is not a function of the value of the goods; it is a function of the mark-up. One exporter may take a $100,000 loss on a cargo of precious gems valued at $10 million, while another may make a $100,000 profit on cargo of cement valued at $1 million. Thus, the Government's own argument reinforces the conclusion that the HMT does not approximate use of harbor facilities, but is instead a traditional *ad valorem* tax which bears no relation to the benefit the taxpayer derives from the tax.[11]

Contrary to the Government's assertion (Pet. 21), the Court of Appeals heeded this Court's admonition that the validity of a charge is to be "judged by its result, not its formula." The Court of Appeals did not find that the HMT is not based on a fair approximation of use simply because it is assessed *ad valorem*. Rather, the court examined the results that follow from the *ad valorem* application of the tax and properly concluded that the HMT is not based upon a fair approximation of use. Nor did the Court of Appeals insist on a "precise calibration" of the HMT to port use in contravention of *Sperry*. The court, after analyzing the application of the tax, recognized that there is no reasonable correlation between the amount of HMT and the amount of

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[11] In regard to the "benefit" provided, Congress pertinently stated: "These fees and taxes offset services rendered to *vessels*." S. Rep. No. 126 at 7, *reprinted in* 1986 U.S.C.C.A.N. at 6644 (emphasis added). Thus, not only are exporters paying a tax based on their presumed ability to pay; they are paying a tax for services "rendered to vessels."

port use.[12] Indeed, the Court of Appeals actually gave the Government the benefit of any doubt and concluded that even if the "fair approximation of use" test refers, as the Government contended, to the *value* of the benefits received rather than the *costs* of the benefits received, the HMT still would not be a fair approximation.[13] (App. 21a-22a).

In short, both courts below correctly applied this Court's precedent and properly found that the HMT on exports is a tax rather than a user fee.[14]

3. The Government's Allegation Of Fiscal Impact Does Not Warrant Granting The Petition.

The Government points to the "fiscal importance" of this case as a reason for granting certiorari (Pet. 12 and 25) but, significantly, has not placed this case in its full context. The Trust Fund has amassed a huge surplus, $865 million as of

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[12] The Government's observation that flat registration fees or "rough approximations" have been countenanced by the Court in certain cases (Pet. 20-21) begs the question. In the HMT context, the lower courts properly found there is absolutely no relationship to port usage.

[13] This is illustrative of the comprehensive, multi-faceted examination performed by the Court of Appeals. Yet the Government's petition ignores many of the grounds that led to the court's decision, namely, the fact that exporters are not assured harbor maintenance at the harbor where their goods are loaded (App. 21a); the stricter examination called for under the Export Clause as compared to the Commerce Clause or the Just Compensation Clause (App. 19a-20a); and the fact that the HMT does not pay for services, such as police services, which provide benefits to exporters by keeping the harbors safe whether the exporters use those services or not (App. 22a).

[14] The HMT also fails the first prong of *Massachusetts* as it discriminates against exporters. The many exemptions in the HMT statute (*see supra* note 3) demonstrate that the HMT is discriminatorily imposed on exporters. Many exempt parties benefit from harbor maintenance projects, as does the general public, yet they do not pay HMT.

fiscal year 1996, which is projected to grow to almost $3 billion in just a few years. *1995-96 Annual Report* at 7. In this regard, the vast bulk of HMT is not within the scope of this case (*id.* at 4) and will not be affected by its outcome. Recognizing concerns about the constitutionality of the HMT on exports, Congress included a severability clause in the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082, 4201 (codified at 33 U.S.C. § 2304).[15] In another HMT case, involving the tax as imposed on passengers, the CIT reviewed the severability clause and held that the HMT as applied to exports is severable from the remaining portions of the statute. *Carnival Cruise Lines, Inc. v. United States*, 929 F. Supp. 1570 (Ct. Int'l Trade 1996). Accordingly, collections as to imports, domestic shipments, passenger services, and admissions to foreign trade zones are all unaffected by this case.

Moreover, a significant portion of the HMT collected on exports will be unaffected as well. The CIT has previously denied attempts to have the HMT litigation certified as a class action. *Baxter Healthcare Corp. v. United States*, 925 F. Supp. 794 (Ct. Int'l Trade 1996). In order to recover HMT payments, therefore, exporters must file lawsuits on an individual basis. While approximately 4,000 cases have been filed in the CIT (numerous plaintiffs have filed multiple actions), many exporters have not filed suit and, therefore,

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[15] With respect to the inclusion of a severability clause, the House Committee on Merchant Marine and Fisheries noted:

> The concern of the Committee and the subject of the [severability clause] amendment was, for example, that the constitutional arguments that had been made against imposing a tax on exports might result in the legislation being declared invalid and it was the desire of the Committee to preserve all other provisions of the Act if that or a similar provision be found invalid.

H.R. Rep. No. 251(IV) at 30.

may be precluded from recovering past payments. Thus, the Government's potential exposure is not as open-ended as might appear at first blush.

Finally, if Congress deems it necessary, it can take steps to ameliorate any effect this case has on future revenue by enacting a *bona fide* user fee to replace the HMT on exports. There are many ways by which this could be done. One possible approach is illustrated by the Harbor Development and Navigation Improvement Act of 1986, enacted as part of the same legislative package that included the HMT. That Act authorizes States to "levy port or harbor dues (in the form of tonnage duties or fees) on a vessel engaged in trade entering or departing from a harbor and on cargo loaded on or unloaded from [the] vessel." 33 U.S.C. § 2236(a). That Act permits the imposition of fees only for certain projects and services and only on certain ships that are comparable in size to those that benefitted from the particular project. The Act identifies specific factors for setting fees such as "elapsed time of passage, safety of passage, vessel economy of scale, under keel clearance, vessel draft, vessel squat, vessel speed, sinkage, and trim." 33 U.S.C. § 2236(a)(3)(B). States can impose the fee only "on a fair and equitable basis" considering "the direct and indirect cost of construction, operations, and maintenance, and providing the facilities and services [listed]; the value of those facilities and services to the vessel and cargo; [and] the public policy or interest served ...." 33 U.S.C. § 2236(a)(4).

Although the Government argues that any alternative to the *ad valorem* HMT would entail unreasonable administrative costs and burdens (Pet. 22-23), Congress plainly concluded that the alternative approach of the Harbor Development and Navigation Improvement Act could readily be administered by the States. It also shows that Congress knows how to authorize a *bona fide* user fee, and it can do so here to replace the unconstitutional burdens on exporters now imposed by the HMT.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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